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NO. 88-337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, an agency of Pierce County, a municipal corporation of the State of Washington, HONORABLE RUDOLPH TOLLEFSON, and ELAINE McNALLY,
Petitioners,

v.

JEAN ELLIOTT, BRENDA POOLE, DIANE G. WARNER, LARRY PIERCE and JULIA FORSBERG,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents agree with the "Opinions Below", "Jurisdiction" and "Rule Involved" as recited in the Petition for Certiorari.

STATEMENT OF THE CASE

Respondents also substantially concur in the statement of the case as presented by Petitioners. Judgment was

entered on December 15, 1986. ER 5, 111. Petitioners did file a notice of appeal on December 24, 1986. On December 26, 1986, Respondents file a "Motion for Equitable Relief". ER 6. The memorandum in support of that motion stated in the last sentence of the first paragraph "This motion may be viewed as a motion to alter or amend judgment pursuant to Fed.R.Civ.P. 59(e)." Id.

On September 10, 1987, the District Court granted in part and denied in part Respondents' Motion for Equitable Relief. ER 60. That Order began by stating:

> This matter comes on before the above-entitled Court upon Plaintiffs' Motion for Equitable Relief, pursuant to 42 U.S.C. § 1983, or in the aternative, as a motion to alter or amend judgment, pursuant to Fed.R.Civ.P. 59(e). Id.

The District Court stayed implementation of the order pending resolution of the matter on appeal. Id. The District Court stayed this matter apparently in response

to Petitioners' December 22, 1986, Motion for Stay of Judgment Pending Appeal. The District Court Order certainly did not impart validity on a premature appeal.

As Petitioners accurately recite, the Ninth Circuit panel found the Notice of Appeal "invalid" and "of no effect," citing FRAP 4(a)(4), and dismissed the case for lack of jurisdiction, citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) and Trinidad Corp v. Maru, 781 F.2d 1360 (9th Cir. 1986). Petition for Certiorari at 11.

REASONS FOR GRANTING THE WRIT

FRAP 4(a)(4) Is Unambiguous and Dispositive of This Petition.

FRAP 4(a)(4) provides that " A Notice of Appeal filed before the disposition of (a Rule 59(e) motion . . . shall have no effect." A Notice of Appeal filed before a Fed.R.Civ.P. 59(e) motion is certainly a

subset of the universe of Notices of Appeal filed before disposition.

Petitioners are incorrect when they state that "This Court has never had the opportunity to consider a case in which 4(a)(4) has been used to invalidate an appeal valid when filed." Petition for Certiorari at 23. This Court has previously denied Certiorari in a very similar case where the Notice of Appeal was filed before a timely Rule 59(e) motion was filed. In Harcon Barge Co. v. D & G Boat Rentals, 746 F.2d 278 (5th Cir. 1984), rehearing granted in part, 760 F.2d 86, on rehearing 784 F.2d 665 (1986), cert. den. sub nom, South Pacific Transportation Company v. Harcon Barge Co. Inc., 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986), the Fifth Circuit Court stated "Under Griggs, the timely filed motion to amend the judgment nullified the prior notice of appeal . . . We therefore lack jurisdiction to hear this

appeal and must dismiss it." Harcon Barge Co. v. D & G Boat Rentals, 746 F.2d at 281. In Griggs v. Provident Consumer Discount Co., 103 S. Ct. 400, 459 U.S. 56, 74 L. Ed. 2d 225 (1982), this Court stated that "Professor Moore has aptly described the post-1979 effect of a Rule 59 motion on its previously filed Notice of Appeal: 'The appeal simply self-destructs.' 9 J. Moore, B. Ward and J. Lucas, Moore's Federal Practice, paragraph 204.12(1), P. 4-65 n. 17 (1982)." Griggs, 103 S. Ct. at 403. Griggs further added that

> "The Notice of Appeal filed in this case . . . was not merely defective; it was a nullity. Under the plain language of the current rule, a premature Notice of Appeal 'shall have no effect'; a new Notice of Appeal 'must be filed'. In short, it is as if no Notice of Appeal were filed at all. And if no Notice of Appeal were filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely Notice of Appeal is 'mandatory' and 'jurisdictional.'" (Citation omitted.) Id.

The language in Griggs does not leave room for confusion or ambiguity. It is not dictum as claimed by Petitioners. It is controlling and dispositive. A Notice of Appeal filed before the filing of a timely Rule 59(e) motion is certainly one "filed before the disposition" of such a motion, and "shall have no effect." FRAP 4(a)(4).

Courts and Commentators Have Urged Notice to Pro Se Litigants, Not Parties Represented By Attorneys To Be Aware Of The Effect of FRAP 4(a)(4).

At page 13 of its Petition for Certiorari, Petitioners suggest that a trap has been laid which courts and commentators have warned against. In Archer v. Lynaugh, 821 F.2d 1094, 1097 (5th Cir. 1987), the 5th Circuit suggested that District Courts should notify pro se litigants who have filed an initial appeal to file again once a FRAP 4 (a)(4) motion has been disposed of. At pages 14 and 15 of the Petition for Certiorari, Petitioners recite a lengthy

passage from "9 Moore, Federal Courts, para. 204.14, p. 4-120," stating that courts should advise litigants of the problems of prematurity raised by FRAP 4(a)(4). A sentence omitted from the lengthy passage states "It is always the appealing case of the ignorant appellant appearing pro se that test the adherence to absolute requirements." 9 J. Moore, B. Ward and J. Lucas, Moore's Federal Practice, para. 204.14, p. 4-120 (1982).

In the Petition for Certiorari at 15, Petitioners state:

> No one expects a lawyer to know every rule in the books of the jurisdictions in which he or she practices. Except for the few lawyers who have had occasion to consult both FRAP 4(a)(1) and 4(a)(4) frequently, the lawyer who wants to appeal from a judgment entered against his client in a federal district court will have to consult the rules.

William R. Bishin, attorney for Petitioners, is an attorney who advertises monthly in the Washington State Bar News,

regularly reciting his expertise in appellate practice. He is one of the "few lawyers" who have had occasion to consult both FRAP 4(a)(1) and 4(a)(4) frequently. The Petitioners have been represented by an expert, not operating pro se.

CONCLUSION

FRAP 4(a)(4) is unambiguous and dispositive of this matter. Notice of Appeal filed before the filing of a timely Rule Fed.R.Civ.P. 59(e) motion "shall have no effect". The Ninth Circuit Court of Appeals acted appropriately in dismissing this case under Griggs v. Provident Consumer Discount Co., 103 S. Ct. 400, 459 U.S. 56, 74 L. Ed. 2d 225 (1982). The Petition for Certiorari should be denied.

Respectfully submitted,

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